IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELLEN JOHNSTON PLAINTIFF

V. CIV. ACTION NO.: 2:07CV42 WAP-EMB

ONE AMERICA PRODUCTIONS, INC.,
EVERYMAN PICTURES, TWENTIETH
CENTURY-FOX FILM CORPORATION
and JOHN DOES 1 AND 2 DEFENDANTS

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION, PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 59(e), TO ALTER OR AMEND THE DISTRICT COURT'S ORDER, DATED AUGUST 22, 2007, OR , IN THE ALTERNATIVE, MOTION FOR ENTRY OF AN ORDER AUTHORIZING AN INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) AND ENTRY OF A STAY

INTRODUCTION AND SUMMARY

Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation know full well that the "purpose of a Rule 59(e) motion is not to relitigate arguments or persuade a rehearing on the merits, but to call into question a judgment's correctness." *Wiley v. Epps,* 2007 WL 628387, *1 (N.D. Miss., Feb. 26, 2007), *citing In re Transtexas Gas Corp.,* 303 F.3d 571, 581 (5th Cir. 2002). But knowing also that such a motion has legitimate offices, as this Court has acknowledged, *Wiley, supra,* Defendants respectfully submit that this Court's August 22, 2007 Order on Defendants' Motion to Dismiss for Failure To State a Claim should be altered and amended.

In support Defendants present the following three principal reasons for their Motion:

1. The Order's unilateral finding that the Complaint alleges a claim for gross negligence is a manifest injustice because the Defendants were denied the opportunity to brief this issue. Nowhere did Plaintiff argue that she was asserting

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an independent substantive negligence claim. This finding also constitutes a clear error of law: Mississippi does not recognize claims for negligence based on a creative work, such as a movie, entitled to the full protection of the First Amendment. *E.g., Mitchell v. Random House, Inc.,* 865 F.2d 664, 672 (5th Cir. 1989) ("the only decisions [in Mississippi] that have held that a written publication could form the basis for an action based on negligence involve instances of commercial speech"); *accord, Pierce v. The Clarion-Ledger,* 433 F. Supp. 2d 754 (S.D. Miss. 2006), *aff'd*, 2007 WL 1191724 (5th Cir. 2007). The August 22 Order therefore should be amended to dismiss any gross negligence claim found on the face of the Complaint.

2. The Order's finding that the Complaint states a claim for false light invasion of privacy represents a substantial departure from established Mississippi law. Specifically, the District Court's Memorandum Opinion accompanying the Court's Order, without acknowledging numerous state and federal court decisions to the contrary, allows Plaintiff's *subjective* view of the portrayal of her in the film – what she "would believe others would believe" upon viewing the scene – to determine whether the portrayal is actionable. Furthermore, the Opinion inexplicably fails to mention much less apply any of the substantive principles of Mississippi law that guide the courts in determining whether her false light claim is actionable.

3. In finding that the Complaint states a claim for commercial appropriation, the Order and accompanying Memorandum Opinion also contain clear errors of law in failing to distinguish commercial speech, that is, speech that proposes a commercial transaction, from communicative speech and in failing to recognize that the use of the crowd scene at the public religious worship meeting where Plaintiff's image briefly appears in the film is an editorial decision clearly protected by the First Amendment. The incidental use of Plaintiff's image in an expressive or communicative work such as *Borat* is non-actionable as a matter of law under Mississippi common law and the First Amendment.

As explained below, the District Court's legal conclusions as to each issue are clear and manifest errors of law, which Defendants respectfully request that the District Court must correct.[1]

In the event that the District Court denies Defendants' Motion to Alter or Amend the Judgment, Defendants respectfully submit that the issues - as framed by the District Court -

[1] Other factual errors appear in the District Court's Opinion including statements suggesting that the Complaint alleges that the church meeting episode took place in Clarksdale, Mississippi, and that Defendants represented to Plaintiff and others that the "religious documentary" would only be shown in foreign countries. Neither statement is included in Plaintiff's Complaint. Since they are not clear errors of law (and they are irrelevant for purposes of the issues raised by Defendant's instant motion), Defendants will not address them now. By not addressing them, Defendants do not concede or admit to the accuracy of either statement.

present controlling questions of law about which there is a substantial ground for a difference of opinion and that an immediate appeal to the Fifth Circuit from the District Court's Order may materially advance the termination of this litigation. Defendants therefore request that the District Court certify these issues for interlocutory appeal and that it stay these proceedings until the Fifth Circuit has acted on Defendants' petition for interlocutory appeal.

I. PROCEDURAL HISTORY

Plaintiff Ellen Johnston alleges in her Complaint that Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation "invaded Plaintiff's privacy," "portrayed Plaintiff in a false light," "led [her] to believe that [Defendants'] camera crew was filming a 'documentary,'" and "had no authority to show her in the film *Borat.*" Plaintiff's Complaint ¶¶ 4-6 (March 19, 2007). In the paragraph immediately preceding the *ad damnum* clause, Plaintiff includes the boilerplate verbiage for a punitive damages demand under Mississippi common law, including the phrase "gross negligence." Plaintiff's Complaint ¶ 7. Plaintiff concludes her Complaint by seeking both compensatory and punitive damages. Plaintiff's Complaint (March 19, 2007).

Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation moved to dismiss the Complaint in its entirety because the factual allegations failed to state a claim.[2] Defendants argued that Mississippi law recognizes four different privacy torts, and while the Complaint did not clearly articulate what type (or types) of privacy claims Johnston asserts, her Complaint failed to include the factual allegations necessary for recovery under any of the four privacy torts recognized in Mississippi when viewed in the light of the motion picture film

[2] *See* Motion of Defendants' to Dismiss for Failure to State a Claim (June 20, 2007); Docket 7.

itself. *See* Motion of Defendants' to Dismiss for Failure to State a Claim (June 20, 2007); Docket 7. Defendants did not challenge Plaintiff's demand for punitive damages, since that request could not survive independent of a cognizable privacy claim for compensatory damages.

Plaintiff argued that the "basis for the Plaintiff's allegations against the Defendants is that her right to privacy has been invaded" and that the "court does not have to look beyond the allegations of the Complaint to determine that a cognizable claim is asserted both factually and legally for invasion of privacy." Plaintiff's Response to Defendants' Motion to Dismiss for Failure to State a Claim etc. at pp. 3, 13 (July 3, 2007); Docket 10. Nowhere in opposing Defendants' Motion to Dismiss did Plaintiff contend or suggest that her Complaint might survive Defendants' Motion because she had alleged a separate claim for gross negligence. *Id.* In fact Plaintiff asked for leave to amend her Complaint to add an additional tort claim in the event that Defendants' Motion to Dismiss was granted and her Complaint was dismissed in its entirety. *Id.* 14.

The District Court granted in part and denied in part Defendants' Motion to Dismiss for Failure to State a Claim. Order (Aug. 22, 2007); Docket 18. The District Court dismissed Plaintiff's invasion of privacy claim premised upon intrusion upon seclusion and disclosure of private facts, but denied Defendants' Motion as to Plaintiff's invasion of privacy claim premised upon misappropriation of likeness for commercial gain and for false light. *Id.* ¶ 4-5. The District Court apparently read Plaintiff's demand for punitive damages as a separate substantive claim rather than a remedy. Its Memorandum Opinion did not discuss how a "gross negligence" claim is cognizable under the facts alleged in the Complaint, but simply stated in the "Conclusion" that "defendants did not demonstrate that the plaintiff has failed to state a claim for gross negligence." Memorandum Opinion 15.

II. LEGAL DISCUSSION

A judgment or an order may be amended under Federal Rule of Civil Procedure 59(e) to correct a clear or manifest error of law or to prevent manifest injustice. *Wiley v. Epps,* 2007 WL 628387, *1 (N.D. Miss., Feb. 26, 2007), *citing Schiller v. Physicians Res. Group, Inc.,* 342 F.3d 563, 567 (5th Cir. 2003); *see In re Benjamin Moore & Co.,* 318 F.3d 626, 629 (5th Cir. 2002). Under this criterion, and as explained below, the District Court's Order should be altered and amended for three independent reasons.

A. Gross Negligence

First, the Order expressly finds that the Complaint alleges a claim for gross negligence. Order (August 22, 2007); Docket 18. While the phrase "gross negligence" is certainly found in the Complaint, it is there solely as the basis for Plaintiff's alleged entitlement to punitive damages - not as an independent substantive claim. After Defendants moved to dismiss the Complaint, Plaintiff did not argue that her Complaint alleged a claim for gross negligence. In her Response, Plaintiff on several occasions argued either expressly or impliedly that the only claims alleged in her Complaint are those for invasion of privacy. Plaintiff's Response in Opposition to Defendants' Rule 12(b)(6) Motion (July 3, 2007); Docket 10; see Plaintiff's Opposition to Defendants' Motion to Strike (August 8, 2007); Docket 16. Indeed, Plaintiff went so far as to ask that the District Court allow her to amend her Complaint to add an intentional infliction of emotional distress claim if her privacy claims were dismissed. See Plaintiff's Response in Opposition to Defendants' Rule 12(b)(6) Motion (July 3, 2007); Docket 10.

With all due respect, it would be a manifest injustice for this Court to conclude that the Complaint contains a claim for gross negligence when Plaintiff never intended to allege such a claim, and the parties have not briefed the legal sufficiency of such a claim under Mississippi law. To this end, Mississippi does not recognize claims for negligence based on a publication that is entitled to the full protection of the First Amendment, regardless of whether the publication is a work of non-fiction, a newspaper or magazine article, or some other form of communicative or non-commercial speech, and regardless of whether the publication is intended to be sold for a profit. *E.g., Mitchell v. Random House, Inc.,* 865 F.2d 664, 672 (5th Cir. 1989) ("the only decisions [in Mississippi] that have held that a written publication could form the basis for an action based on negligence involve instances of commercial speech"). *Mitchell*'s holding on this issue has not been called into question, and it has since been followed by several different Mississippi federal courts. *E.g., Pierce v. The Clarion-Ledger,* 433 F. Supp. 2d 754, 760 (S.D. Miss. 2006), *aff'd*, 2007 WL 1191274 (5th Cir. 2007); *Haguewood v. Gannett River States Pub. Corp.,* 2007 WL 1728700, *7 (S.D. Miss., June 13, 2007); *Lane v. Strang Communications Co.,* 297 F. Supp. 2d 897, 899 n. 1 (N.D. Miss. 2003).

The film *Borat* is communicative speech -- not commercial speech, which by definition does nothing "more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 385 (1973). Unlike commercial speech, communicative speech, including motion picture films, is entitled to the full protection of the First Amendment. *E.g., Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-02 (1952); *Tyne v. Time Warner Entertainment Co.,* 901 So. 2d 802, 808-09 (Fla. 2005) (relying on *Joseph Burstyn, supra,* to find that to apply the term “commercial purpose” to motion pictures raises a fundamental constitutional concern and that a motion picture film depicting a mix of fact and fiction is protected by the First Amendment and thus as a matter of law can not be the basis for a misappropriation claim). Accordingly, Plaintiff has no claim for gross negligence under

Mississippi law related to the use of her image or likeness in connection with this creative work. *Mitchell, supra; Pierce, supra; Haguewood, supra; Lane, supra.*

Any plaintiff who attempts to recover monetary damages based upon an expressive work about a matter of genuine public interest such as the motion picture film before the District Court must under the First Amendment allege, among other essential elements, that the published work contains statements about the plaintiff that are false or that are made with a reckless disregard as to their truth or falsity. *See, e.g., Time, Inc. v. Hill,* 385 U.S. 374, 388-89 (1967); *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1229-34 (7th Cir. 1993). To hold otherwise is to permit juries or judges to punish the publishers of such works for their opinions and their editorial decisions, which the First Amendment prohibits. Since Plaintiff does not allege that the film contains any false statements about her image or likeness and Plaintiff did not dispute this point in opposing Defendants' Motion To Dismiss, any attempt to salvage her gross negligence claim by further amendment would be futile and should not be allowed. Accordingly, the Order should be amended to dismiss any gross negligence claim found on the face of the Complaint.

B. False Light

Defendants respectfully submit that the District Court's clear error in finding Plaintiff stated a viable false light claim arises first from its almost exclusive reliance upon Section 652E of the Restatement (Second) of Torts and certain comments to that Section. Opinion at pp. 9-10. The District Court inexplicably fails to apply the Mississippi legal principles used in analyzing false light claims developed in the 30 years since the Restatement (Second) of Torts was adopted in 1977.

As Comment *e* to Section 652E points out, the false light tort was then in the earliest stages of its development and it was unclear how and to what extent state law defamation principles would apply to false light claims. Restatement (Second) Torts Section 652E, comment *e* (1977). Subsequent case law in Mississippi makes it unequivocally clear that the principles that guide state and federal court in resolving defamation claims are also to guide our courts when resolving false light privacy claims. *E.g., Mitchell v. Random House, Inc.*, 865 F.2d 664, 672 (5th Cir. 1989); *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So. 2d 77 (Miss. 1986).

Nonetheless, the District Court's Opinion eschews the legal analysis used in all other Mississippi false light decisions addressing mass media publications. Quoting exclusively from Comment *c* and Illustration 9 to Comment *c* of Section 652E, the District Court concludes:

> There are jury questions of (1) whether the Pentecostal scene portraying the Plaintiff waving her arms in religious praise in response to Borat's apparent conversion would be highly objectionable to a reasonable person in the Plaintiff's position, *See* Illustration 9 to comment *c, supra*, such that a person in Plaintiff's position would believe others would believe she willingly participated in a mocking of her religion; and (2) whether "Defendant [knew] that the Plaintiff, as a reasonable [person], would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity," *See* comment *c, supra*.

Opinion 10. The decision is a serious departure from the legal standards imposed by Mississippi law for determining the viability of false light privacy claims. Most fundamentally, the Court has abdicated its responsibility to examine and determine as a matter of law "whether the statements bear meaning ascribed to them by the plaintiff and whether that meaning is [actionable]." *Mitchell v. Random House, Inc.*, 865 F.2d 664, 669 (5th Cir. 1989).

Respectfully, the District Court's analysis merges two distinct elements of the false light claim -- whether the portrayal is susceptible of the meaning Plaintiff ascribes; and assuming the meaning ascribed is reasonable, whether the portrayal is "highly offensive" to a reasonable person in Plaintiff's position. The Opinion initially acknowledges the objective standard articulated in Comment C and illustration 9 and those cases applying Mississippi false light law, *e.g., Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So.2d 77, 79 (Miss. 1986) (false portrayal must be "highly offensive to a reasonable person"). But ultimately the Opinion relies upon a purely subjective belief to sustain the claim -- whether the plaintiff "would believe others would believe"[3] that she was mocking her own religion, with no requirement that the belief be objectively reasonable.

The District Court ignores the requirement in Mississippi that the principles governing defamation claims apply with equal force to claims of false light invasion of privacy. *Prescott*, 497 So.2d at 80-81. In particular, the District Court overlooks the principle that "the [false light] must be clear and unmistakable from the words themselves and not the product of innuendo, speculation or conjecture," a requirement that has been stringently applied and rigorously enforced for two decades in Mississippi false light decisions. *E.g., Blake v. Gannett Co.,* 529 So. 2d 595 (Miss. 1988); *Prescott v. Bay St. Louis Newspapers, Inc.,* 497 So. 2d 77 (Miss. 1986); *Mitchell v. Random House, Inc.,* 865 F.2d 664 (5th Cir. 1989), *aff'g* 703 F. Supp. 1250 (S.D. Miss. 1988); *Haguewood v. Gannett River States Pub. Corp.,* 2007 WL 1728700 (S.D. Miss., June 13, 2007); and *Gales v. CBS Broadcasting, Inc.,* 269 F. Supp. 2d 772 (S.D. Miss. 2003).

The District Court accepts Plaintiff's subjective interpretation of how others might view the scene -- a characterization that at best relies upon innuendo and conjecture to arrive at any

[3] This articulation is reminiscent of the insecure teenager who although objectively beautiful by any standard, nevertheless is convinced that others think she is unattractive. Her belief is honest but, by any objective standard, completely unreasonable. Precisely because our subjective views on matters that affect us personally may be quite unreasonable, the law does not allow recovery based solely on a plaintiff's subjective belief or feeling absent objective reasonableness, which is a threshold issue of law for the Court. "Thus, a [false light] plaintiff's subjective threshold of sensibility is not the measure . . . ." 77 C.J.S. *Right of Privacy and Publicity*, § 28, at p. 562 (2006); *see also Plaxico v. Michael*, 735 So. 2d 1036, 1039 (Miss. 1999) (affirming dismissal of privacy claims by woman who was surreptitiously photographed through her bedroom window, in bed, naked from the waist up, by her lover's ex-husband; "a reasonable person would not feel Michael's interference with Plaxico's seclusion was a substantial one that would rise to the level of gross offensiveness as required to prove . . . intentional intrusion upon seclusion or solitude"). As explained in the text, Plaintiff's false light claim is insufficient to pass this legal threshold under Mississippi law.

arguable misrepresentation of Plaintiff's character or beliefs. Because Plaintiff has never argued that her actions depicted in the film are false, her subjective interpretation relies upon context to create a false impression. Although in some instances the context might cause a true fact to give a false impression and thereby place a person in a false light, this "does not relieve a plaintiff from identifying particular statements or passages that are false and invade his privacy." *Id.* (citing *Rinsley v. Brandt*, 700 F.2d at 1310). The District Court must determine then, among other things, whether Plaintiff has identified particular aspects of the portrayal from which a reasonable audience could conclude that Plaintiff knew Borat was "faking it" and poking fun at her religious beliefs or practices, and that she reacted as she did because she was in on the joke.

The District Court's own description of the film demonstrates that the context, rather than placing Plaintiff in a false light, makes it virtually impossible to give the scene the interpretation that Plaintiff urges and the District Court accepts. On page 2 of its Opinion, the Court states "[t]he viewer of the film is aware that although the character Borat and his producer are actors, almost everyone they meet are not actors and are unaware that Borat is a fictional character, believing he is in fact from Kazakhstan filming a documentary on American culture." At page 14, the Court reiterates that "the viewer [of Borat] is also aware that the vast majority, if not all, of the other people featured in the movie are non-public figures who are not actors and are likely unaware that Borat is not a . . . reporter filming a documentary . . . ." Thus, regardless what Plaintiff "believes others would believe," no reasonable person viewing the scene in context would understand that Johnston was doing anything other than what the film depicts -- rejoicing in what she thought was a sincere religious conversion.

C. Misappropriation of Name or Likeness

The District Court wholly misapprehends *Matthews v. Wozencraft,* 15 F. 3d 432, 440 (5th Cir. 1994), and *Matthews*' discussion of that plaintiff's misappropriation claim. With all due respect, the Opinion's treatment and rejection of *Matthews*, a case relied upon by Defendants in their motion papers, is not a mere difference of how *Matthews* or its principles should be applied but a clear error of law. The District Court rejects *Matthews* on the grounds, among others, that *Matthews'* "holdings . . . were based on a Texas statute regarding misappropriation." Opinion 11. *Matthews* is not based on any statute[4] but rather a Texas common law claim for misappropriation, which is grounded on and analyzed under the same section (and comments) of the Restatement (Second) of Torts as Mississippi's common law claims for misappropriation. *See Matthews v. Wozencraft,* 15 F. 3d at 437, *quoting* Restatement (Second) of Torts § 652C and comments *b-d* (1977).

The District Court's Opinion then correctly notes that *Matthews* states that "[a]ppropriation of a name or likeness generally becomes actionable when used 'to advertise the defendant's business or product, **or for some similar commercial purpose,'**" Opinion 11, quoting *Matthews,* 15 F.3d at 437 (quoting Restatement (Second) of Torts § 652C, comment *b* (1977). Yet the District Court's Opinion fails to point out that *Matthews* then dismisses the plaintiff's misappropriation claim based on facts similar to those here.

The *Matthews* court expressly finds that the use of another person's name, likeness, or the general incidents of that person's life as the subject matter of a novel are not actionable under Texas misappropriation law. *Matthews,* 15 F.3d at 437-39. The *Matthews* court also expressly rejects the argument that the use of either the plaintiff's likeness or the events associated with his life - even if fictionalized – is an impermissible "similar commercial purpose" proscribed by

[4]The only Texas statutes cited in *Matthews* involve the Texas Family Code and issues related to a divorce decree. *Matthews,* 15 F.3d at 442, citing Tex. Fam. Code §§ 3.71, 3.90.

Section 652C. *Matthews,* 15 F.3d at 437-39. In short, there is no principled distinction between the *Matthews* plaintiff's misappropriation claim and that of Johnston's.

The *Matthews* court also holds, as an alternative ground, that the First Amendment bars the plaintiff's appropriation claim. *Matthews,* 15 F.3d at 439. Contrary to what the District Court states, see Opinion 11, the *Matthews* court's dismissal of the appropriation claim is **not** based on the plaintiff's subsequently acquired status as a public figure.[5] *See Matthews,* 15 F.3d at 439.

In its ensuing discussion of Section 652C and the Mississippi commercial appropriation cases, the District Court's Opinion commits another clear error of law. See Opinion 10-12. Citing *Candebat v. Flanagen,* 487 So. 2d 207 (Miss. 1986), and *Harbin v. Jennings,* 734 So. 2d 269 (Miss. Ct. App. 1999), the District Court seizes upon the phrases "commercial advantage," and "commercial enterprise" and then equates them as though they are equivalent terms without also employing the analysis used in *Matthews* to recognize and understand the limitations that the First Amendment places upon appropriation claims that are based on an expressive or communicative work such as a motion picture film. *E.g., Tyne v. Time Warner Entertainment Co.,* 901 So. 2d 802, 808-09 (Fla. 2005) (rejecting appropriation claim based on the movie, *The Perfect Storm* - "Other federal courts have similarly concluded that works such as the [motion] picture [film] in the instant case would be protected by the First Amendment and that they do not constitute a commercial purpose.").

Candebat and *Harbin* are commercial speech cases. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973); *see also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New* York, 447 U.S. 557, 561 (1980) (commercial speech is "expression related solely to the economic interests of the speaker and the

[5] The *Matthews* plaintiff became a public figure only **after** the publication of the novel that was the subject of the suit and the plaintiff had discussed the book with the media and also worked with another author who published a non-fiction book of the plaintiff's life. *Matthews,* 15 F.3d at 436.

audience"). Each involves the unauthorized use of the name or image of the plaintiff in proposing a commercial transaction, *Candebat,* or in advertising a product for sale to the public, *Harbin.* The Opinion improperly equates *Borat*, a communicative form of expression protected by the First Amendment[6], with the commercial activities of *Candebat* and *Harbin,* erroneously finding that *Borat* is a "commercial enterprise." Opinion 13-14 ("It is undisputed that the movie *Borat* was a commercial enterprise, shown in theaters across the United States and Europe, and is now widely distributed in DVD format."). With all respect to the Court, properly understood, *Candebat* and *Harbin* provide no legal support for the District Court's holding.

Upon applying *Matthews'* analysis of the same comments from the Restatement, it is clear that a communicative or expressive work such *Borat* is not the type of "similar commercial purpose" that comment *b* contemplates. *See Tyne v. Time Warner Entertainment Co.,* 901 So. 2d 802, 808-09 (Fla. 2005) (holding that movies such as *A Perfect Storm* do not constitute a commercial purpose). The District Court's Opinion fails to recognize this distinction or to discuss why the analysis used in *Matthews* does not also bar Johnston's appropriation claim. Just like the plaintiff in *Matthews,* Johnston's image is used in a creative work that not only falls outside the proscription of comment *b* to Section 652C but is also entitled to the full protection of the First Amendment. *Matthews v. Wozencraft,* 15 F.3d 432, 440 (5th Cir. 1994); *Tyne v. Time Warner Entertainment Co.,* 901 So. 2d 802, 808-09 (Fla. 2005).

The District Court dismisses the discussion of First Amendment principles as applied to motion picture films, found in cases such as *Joseph Burstyn, Inc., v. Wilson,* 343 U.S. 495

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[6] "Generally, unauthorized use of a person's identity falls within one of two categories - 'communicative' or 'commercial.' In communicative use, the policy of free speech wins over the right of publicity; it is entitled to the highest level of First Amendment protection. In commercial use, the right of publicity generally wins because, while, there are overtones of ideas being communicated, the use is primarily commercial." *Pooley v. National Hole-In-One Ass'n*, 89 F. Supp. 2d 1108, 1113-14 (D. Ariz. 2000) (internal citations omitted).

(1952), on the ground that "the decision in *Wilson* did not involve an invasion of privacy claim by a private citizen." Opinion 14. However, *Tyne, supra,* a 2005 decision of the Florida Supreme Court, expressly discusses and relies upon *Wilson* when addressing and dismissing as a matter of law the misappropriation claims of several private figure plaintiffs based on a motion picture film. *Tyne v. Time Warner Entertainment Co.,* 901 So. 2d at 808-11. Once again, there is no principled distinction between *Tyne* and this case, and the District Court's discussion and conclusion are clear manifest errors of law. *Matthews* and *Tyne* show that the protections afforded by the First Amendment may not be cast to the side so easily.

Regardless of whether Johnston is a private figure or a public figure, the First Amendment creates a privilege that allows the publication of her image or likeness in this context. Plaintiff has no more right to object to the use of her image or likeness as it was used here than if a reporter had been present and written an article about the church camp meeting that expressly mentioned Johnston and accurately described her activities while in that same public setting. *Matthews, supra; Tyne, supra; see Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1229-34 (7th Cir. 1993). Defendants have found no reported decision that holds otherwise.

Finally, as Comment *d* to Section 652C makes clear, "[n]o one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation." Restatement (Second) of Torts § 652C comment *d* (1977). Earlier, the District Court has correctly pointed out that, "it is undisputed that the plaintiff was attending a public religious meeting and did not expect seclusion" and "it is undisputed that it was not a private fact that the plaintiff attended the public meeting." Opinion 7. Thus, what is seen in the film is nothing more than what any one else would have seen had they been at the church camp meeting observing the crowd or Johnston as she took part in this public meeting. The portion of the District Court's Opinion at p. 13 that references the incidental use principle found in comment *d* to Section 652C of the Restatement (Second) of Torts appears to acknowledge that an incidental use of a person's name or likeness in an expressive or communicative work is non-actionable at common law. But the Court erroneously concludes that *Borat* is commercial speech and by implication that it is therefore not entitled to the benefit of the rule that the incidental use of a person's name or likeness in this context – the fleeting appearance of a person in a public crowd scene - is non-actionable. With all respect, Defendants have found no reported decision that holds that a motion picture film such as *Borat* is commercial speech or that the incidental use of a person's image in this context is actionable. As discussed above, all published authority is to the contrary. The District Court's discussion of these First Amendment principles and its findings and holding as they apply to Johnston's misappropriation claim are a clear manifest error of law.

III. Motion To Certify Appeal Pursuant To 28 U.S.C. § 1292(b)

In the alternative, if the District Court denies Defendant's Motion to Alter or Amend the Judgment, the Defendants respectfully request that the District Court enter an order, pursuant to 28 U.S.C. § 1292(b), certifying this case for interlocutory appeal. Certification is appropriate because the District Court's Memorandum Opinion involves controlling questions of law about which there are substantial differences of opinions and an appeal from the Order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

The District Court's opinion presents the following controlling questions of law about which there is a substantial ground for a difference of opinion:

1. Does Mississippi law recognize an independent claim for gross negligence based on a mass media creative work such as a motion picture film?

2. In a false light privacy claim based on non-commercial mass media publication such as a motion picture film, does Mississippi law impose a

> subjective or an objective standard for determining whether the portrayal reasonably conveys the meaning urged and whether that meaning is highly offensive to a reasonable person?
>
> 3. Is there an appropriation of Plaintiff's image for a commercial purpose from which Defendants derive a commercial or non-pecuniary benefit, or is the fleeting use of Plaintiff's image in a public crowd scene incidental to the film and thereby protected either under Mississippi law or the First Amendment?

A "question is controlling only if a contrary decision would materially advance the ultimate termination" of the litigation. 16 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3930, at p. 133 (Supp. 2007). "Plainly dispositive questions going to the merit of the case" which may be raised by a motion to dismiss are appropriate candidates for interlocutory appeal under Section 1292(b) and in fact they "have frequently been allowed from the question whether the plaintiff has stated a claim if the problem is a difficult one of substantive law . . . ." 16 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3931, at p. 458 (1996); *see, e.g.*, *Horsley v. Rivera*, 292 F.3d 695 (11th Cir. 2002) (district court denied motion for judgment on the pleadings that argued statement was constitutionally protected expression of opinion and/or rhetorical hyperbole; certified for interlocutory appeal; appeal granted; order was reversed and case remanded with instructions to enter judgment for defendant).

If the District Court certifies the foregoing issues for interlocutory appeal and the Fifth Circuit resolves those issues in Defendants' favor rather than after expensive discovery and a full trial on the merits, the courts and all parties will avoid unnecessary, protracted, and expensive litigation. As an early resolution of these issues would help conserve substantial resources of the federal courts and also avoid undue expense to the parties, Defendants respectfully submit that entry of such an order is appropriate.

CONCLUSION

For the forgoing reasons, Defendants respectfully submit that the District Court has misconstrued Plaintiff's Complaint and committed several clear manifest errors of law as to either any alleged gross negligence claim and as to any privacy claims based upon an expressive work such as the motion picture *Borat*. The District Court should amend its August 22 Order and dismiss Plaintiff's Complaint in its entirety. In the alternative, Defendants respectfully request that the District Court certify these controlling issues of law to the United States Court of Appeals for the Fifth Circuit for consideration on interlocutory appeal.

THIS, the 5th day of September, 2007.

Respectfully submitted,

ONE AMERICA PRODUCTIONS, INC.,
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CERTIFICATE OF SERVICE

I, John C. Henegan, one of the attorneys for Defendants, do hereby certify that I have this day filed the above and foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER THE DISTRICT COURT'S DECISION, DATED AUGUST 22, 2007, with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
wol@lucketttyner.com

ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 5th day of September, 2007.

s/ John C. Henegan
JOHN C. HENEGAN

Jackson 2310260v.1